Supreme Court, U.S.
FILED
SEP 12 2002
OFFICE OF THE CLERK

No. 01-1687

(2)

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK J. GRIFFIN, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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18 pp

QUESTION PRESENTED

Congress has declared that national cemeteries maintained by the Department of Veterans Affairs (VA) "shall be considered national shrines as a tribute to our gallant dead." 38 U.S.C. 2403(c). To implement that mandate, the VA has promulgated regulations providing for the display of the American flag at national cemeteries, but strictly limiting the display of other flags at such sites. The question presented is:

Whether the court of appeals properly upheld the VA's denial of petitioner's request to fly a Confederate flag on a daily, year-round basis at a national cemetery in Maryland.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B13) is reported at 274 F.3d 818. The opinion of the district court (Pet. App. C1-C23) is reported at 129 F. Supp. 2d 832.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2001. A petition for rehearing was denied on February 12, 2002 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on May 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has placed the country's national cemeteries under the authority of the National Cemetery Administration (NCA) within the Department of Veterans Affairs (VA). 38 U.S.C. 2400(b), 2403(c). NCA oversees 120 national cemeteries comprising more than 13,000 acres. By statute, the cemeteries are to be maintained as "national shrines as a tribute to our gallant dead." 38 U.S.C. 2403(c). Consistent with that mandate, Congress has authorized the Secretary of Veterans Affairs to "permit appropriate officials to fly the flag of the United States of America at such cemeteries twenty-four hours each day." 38 U.S.C. 2403(c); see 4 U.S.C. 6 ("Time and occasions for display" of U.S. flag).

Congress also has provided for the display of the National League of Families POW/MIA flag (POW/MIA flag) at national cemeteries and certain other locations on six days each year -- Armed Forces Day, Memorial Day, Flag Day, Independence Day, National POW/MIA Recognition Day, and Veterans Day. 36 U.S.C. 902(b), (c) and (d)(4). In doing so, Congress has explained that the POW/MIA flag is "the symbol of the Nation's concern and commitment to achieving the fullest possible accounting of Americans who, having been prisoners of war or missing in action, still remain unaccounted for." 36 U.S.C. 902(b)(1) and (2).

The Secretary of Veterans Affairs is "authorized to make all rules and regulations which are necessary or appropriate" to administer cemeteries and memorials under the VA's jurisdiction. 38 U.S.C. 2404(a). The Secretary has delegated this authority to

the Under Secretary for Memorial Affairs, who heads NCA (formerly the Director of the National Cemetery System (NCS)). 38 C.F.R. 2.6(f); see 38 U.S.C. 512, 2400(a) (authority for delegation).

The VA regulates activities on "property under the charge and control of VA," including national cemeteries as well as VA hospitals, clinics, and regional offices. 38 C.F.R. 1.218(a). Section 1.218(a)(14) of the VA's regulations provides in part:

> (i) All visitors are expected to observe proper standards of decorum and decency while on VA property. Toward this end, any service, ceremony, or demonstration, except as authorized by the head of the facility or designee, is prohibited. * * *
>
> (ii) For the purpose of the prohibition expressed in this paragraph, unauthorized demonstrations or services shall be defined as, but not limited to * * * the display of any placards, banners, or foreign flags on VA property unless approved by the head of the facility or designee * * * .

38 C.F.R. 1.218(a)(14).

In 1995, the VA issued a Directive and Handbook (Pet. App. E1-E12) providing interpretive guidance on Section 1.218(a)(14) with respect to the display of flags in national cemeteries. Among other things, that guidance -- which has been referred to in this case as the Flag Manual or Old Flag Manual -- generally authorized the display of the Confederate flag in national cemeteries on only two days a year, Memorial Day and, in States where it is observed, Confederate Memorial Day. See id. at E10-E11, E13.[1]

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[1] On April 30, 2001, after the district court issued its decision in this case, the VA issued a new directive on flags in national cemeteries. Pet. App. D1-D14. That guidance does not materially alter the restrictions at issue in this case, see id. at D9-D12, and thus has not resulted in any change in the VA's position with respect to petitioner's effort to display the

2. Point Lookout Confederate Cemetery (Point Lookout) is a national cemetery located in St. Mary's County, Maryland. During the Civil War, the federal government maintained a prisoner of war camp at Point Lookout. Many Confederate soldiers died in captivity at Point Lookout and approximately 3300 are buried in a mass grave there, marked by an 85-foot monument erected and maintained by the federal government. The names of Confederate prisoners known to have died at Point Lookout are listed on 12 plaques at the base of the monument; a separate plaque notes that the monument was built by the federal government. A smaller state monument also has been erected at Point Lookout. Pet. App. C1-C2.

The only other permanent display at Point Lookout is the flagpole on which the U.S. flag is flown. Pet. App. C2. The American flag is flown every day at all hours of the day, and is illuminated from sunset to sunrise. Ibid. As required by statute (36 U.S.C. 902), the POW/MIA flag is flown at Point Lookout on six days a year -- Armed Forces Day, Memorial Day, Flag Day, Independence Day, National POW/MIA Recognition Day, and Veterans Day. Pet. App. B11 n.3; see 36 U.S.C. 902. A Confederate flag was displayed daily at Point Lookout between 1994 and May 1998 -- contrary to the regulations discussed above -- due to the ultra vires action of a VA employee. Pet. App. C15 n.12.

3. Petitioner is a member of the organization Sons of Confederate Veterans, and is a descendant of a Confederate soldier imprisoned at Point Lookout. Pet. App. C4, C5 & n.4. He requested

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Confederate flag at Point Lookout. See id. at B4 n.1.

permission from the VA to erect a flagpole and display the Confederate flag on a daily basis at Point Lookout. When the VA denied that request, petitioner filed this action alleging, inter alia, that the VA's regulations restricting the display of the Confederate flag in national cemeteries are unconstitutional both as applied to him and on their face. Id. at C4-C5.

The district court granted petitioner's request for declaratory and injunctive relief. Pet. App. C1-C23. The court first held that it lacked jurisdiction to entertain petitioner's facial challenge to the VA's regulations concerning the display of flags in national cemeteries, including the VA's guidance in the 1995 Directive and Handbook on flag displays, explaining that under 38 U.S.C. 502 such a facial challenge is within the exclusive jurisdiction of the Court of Appeals for the Federal Circuit. Pet. App. C6-C8.[2] Accordingly, the court focused its decision to petitioner's as-applied challenge. Id. at C9.

In analyzing that challenge, the court described "the speech at issue" as "the display of the Confederate flag" at Point Lookout. Pet. App. C11. The court then found that Point Lookout is a "nonpublic forum," explaining "that Point Lookout, and national cemeteries in general, are not 'generally available'" to

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[2] Petitioner filed a separate action in the Federal Circuit challenging the VA's regulation on its face. See Pet. 7 n.3. In Griffin v. Secretary of Veterans Affairs, 288 F.3d 1309 (2002), petition for cert. pending, No. 01-1782 (filed May 30, 2002), the Federal Circuit rejected that challenge. Petitioner has filed a separate petition for a writ of certiorari from the Federal Circuit's decision, and the government has filed a separate opposition to that petition.

the public, and that "the nature of the property [i.e., a cemetery] is not compatible with expressive activity." Id. at C13-C14. "Having determined that Point Lookout is a non-public forum," the court stated that "restrictions on the requested display of the Confederate flag will be upheld only if they are reasonable in light of the purpose served by the forum and are viewpoint neutral." Id. at C14; see id. at C12-C13 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985)).

Applying that test, the court rejected the government's argument that the restrictions are reasonable in light of Congress's declaration that national cemeteries "shall be considered national shrines as a tribute to our gallant dead." 38 U.S.C. 2403(c). In the court's view, there was no reason to conclude that display of the Confederate flag would "create controversy or disrupt the tranquility and dignity of Point Lookout," and "one is hard put to imagine a rationally thinking person attributing a racial or discriminatory message to [the Confederate flag]." Pet. App. C15.

The court also rejected the VA's argument that the display of a flag at a national cemetery established by Congress is a form of government speech. Instead, the court stated, "[t]he issue in the present case involves private speech on government property, which implicates the protections provided by the First Amendment." Pet. App. C16-C17. In addition, the court concluded that the VA's refusal to allow petitioner to display the Confederate flag at

Point Lookout on a daily basis amounted to impermissible viewpoint discrimination and was content-based. Id. at C19-C21.

Accordingly, the court held that the VA's regulations, "as applied to the Confederate flag in the context of Point Lookout," violate the First Amendment. Pet. App. C21. The court ordered the VA to allow petitioner to display the Confederate flag at Point Lookout on a daily basis, from a flagpole erected and maintained by petitioner. Id. at C22, C10-C11 n.9.

4. The court of appeals reversed. Pet. App. B1-B13. The Fourth Circuit agreed with the district court and the parties "that Point Lookout is a nonpublic forum," and that "[r]estrictions on speech in such a forum must be both reasonable in light of the purpose of the forum and viewpoint neutral." Id. at B3 (citing Cornelius, 473 U.S. at 806). Applying that framework, the court concluded that the VA's denial of petitioner's request to display the Confederate flag at Point Lookout was both reasonable and viewpoint neutral, and therefore was permissible. Id. at B2.

The court of appeals stated that the purpose of Point Lookout "is to honor, as Americans, in tranquil and nonpartisan surroundings, those who have given their lives to the Nation," and held that the VA's restrictions on the display of flags at Point Lookout "are reasonable both as a means of ensuring the integrity of the VA's own message (which, in this case, coincides with the purpose) and, relatedly, as an effort to maintain the nature of the forum." Pet. App. B4. In so holding, the court emphasized that "Congress' evident concern that [national] cemeteries 'shall be

considered national shrines' and its focus on 'our gallant dead,' combined with its emphasis on the flying of the 'flag of the United States of America,' all but inexorably lead to the conclusion that Congress did, as the VA maintains, intend national cemeteries to be places in which we honor 'our gallant dead' as Americans." Id. at B5 (quoting 38 U.S.C. 2403(c)).

The court of appeals noted that "nothing in the district court's opinion rejects or even refutes the VA's position that the purpose of Point Lookout is to honor those Confederate soldiers who are buried there as Americans." Pet. App. B6. In any event, the court continued, "the reasonableness of the VA's restrictions turns on whether the purpose of Point Lookout is to honor the Confederates as Confederates or as Americans." Ibid. Contrary to petitioner's argument, the court stated, the district court made "no factual finding" on that "pivotal distinction to which [the court was required to] defer." Ibid. Thus, the court of appeals reasoned, "because the statute compels us to accept the VA's position [on that distinction], we hold that the purpose of Point Lookout is to honor the soldiers buried there as Americans." Ibid.

The court of appeals had "no trouble" concluding that the VA's restrictions on displaying the Confederate flag are reasonable in light of the purpose of Point Lookout. Pet. App. B7. The court explained that "[t]he government is entitled to promote particular messages and to 'take legitimate and appropriate steps to ensure that its messages [are] neither garbled nor distorted.'" Ibid. (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S.

819, 833 (1995)). Nor, in the court's view, was there anything unreasonable about the VA's decision to allow the display of the Confederate flag in national cemeteries only on Memorial Day and Confederate Memorial Day. Id. at B8. Instead, the court concluded that the VA's policy reasonably accommodated the interests of those such as petitioner who wished to display the Confederate flag "without unduly disturbing or distorting the VA's overall message of honoring the dead as American citizens." Ibid.

Likewise, the court of appeals concluded that the challenged restrictions "were reasonable in light of the VA's desire to preserve the tranquility of national cemeteries." Pet. App. B9. "[C]ertainly," the court explained, "the VA could reasonably believe that the Confederate flag could cause controversy and that such controversy could undermine the VA's goal of keeping the cemeteries free from partisan conflict." Ibid. Moreover, the court continued, "[t]he First Amendment does not preclude the VA from taking steps to preserve the nature of this nonpublic forum," ibid. (citations omitted), "a cemetery dedicated to honoring, as Americans, the Nation's war dead." Id. at B10.

The court of appeals also held that "[t]he district court erred by concluding that the VA discriminates against [petitioner]'s message on the basis of viewpoint." Pet. App. B12. The court explained that, because the VA is allowed to determine its "own message," "[t]he only issue is how the VA treats what little private speech it does allow at [Point Lookout]." Id. at B10-B11. In that regard, the court found that under the VA's

regulations "groups that wish to fly the Confederate flag actually enjoy an advantage over other groups," id. at B11, i.e., they "may fly the Confederate flag two days a year without seeking special permission." Ibid. Accordingly, the court held, "[o]n this record, it is not possible to conclude that the VA discriminates against those who seek to display the Confederate flag or even that the VA is motivated by animosity toward that flag." Id. at B12.[3]

ARGUMENT

The court of appeals correctly held that petitioner is not entitled to erect a flagpole and fly the Confederate flag on a daily basis at the Point Lookout national cemetery. Its unanimous decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner suggests that "the Court should grant review to clarify the distinctions between speech and the forum for speech and between private speech and government speech." Pet. 13 (heading). In particular, petitioner argues that the court of appeals "simply conclude[d] that the VA is using the Cemetery itself to communicate its purported message of honoring the Confederate dead 'as Americans,'" and "thus transform[ed] the

[3] The court of appeals rejected petitioner's facial challenge to the VA's regulations. Pet. App. B12-B13. The court explained that, under 38 U.S.C. 502, it appeared that only the Court of Appeals for the Federal Circuit had jurisdiction to consider such a challenge. Pet. App. B12. In any event, the court observed that petitioner's facial claim, too, lacked merit, because "the precise form of expression in which [petitioner] wishes to engage -- daily display of a Confederate flag in a nonpublic forum not open to such -- is, by definition, not constitutionally protected expression." Id. at B13.

Cemetery from a government-owned forum for private speech -- where viewpoint discrimination is unconstitutional -- into government speech -- which may express the government's favored viewpoint." Id. at 14 (citations omitted). That is incorrect.

In conducting its First Amendment analysis, the court of appeals faithfully followed the principles applied by this Court in Cornelius. See 473 U.S. at 797; see Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677-678 (1998) (discussing Cornelius). The court identified the relevant forum, then, after determining that the forum is nonpublic, looked to whether the challenged restriction on speech in that forum is "reasonable in light of the purpose served by the forum and [is] viewpoint neutral." 473 U.S. at 806. It is undisputed that Point Lookout is a nonpublic forum. Pet. App. B3. In determining the purpose of that forum, the court of appeals properly looked to the intent of Congress in establishing the forum. See id. at B4-B6.

In light of the statutory mandate in 38 U.S.C. 2403(c), the court of appeals correctly determined that "the purpose of Point Lookout is to honor the soldiers buried there as Americans." Pet. App. B6. And in light of that purpose, the court correctly determined that the VA's restrictions on the display of the Confederate flag at Point Lookout are reasonable. Indeed, the court had "no trouble" reaching that conclusion. Id. at B7. As this Court emphasized in Cornelius, "[t]he Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation."

473 U.S. at 808. The restrictions at issue in this case readily meet that "deferential test." Pet. App. B7.

The court of appeals also correctly observed that the government is entitled "to promote particular messages," and to ensure that its intended message is "neither garbled nor distorted." Pet. App. B7 (citing Rosenberger, 515 U.S. at 833); see Rust v. Sullivan, 500 U.S. 173 (1991). Indeed, the very nature of a nonpublic forum lends itself to the conclusion that the government has significant control over the speech, whether government or private, that takes place in that forum. See Cornelius, 473 U.S. at 805-806; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (a nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication"). There is nothing unusual, therefore, about the Fourth Circuit's decision that the VA may take reasonable steps to regulate speech or expressive conduct at Point Lookout, consistent with the clear purpose of that forum "to honor the soldiers buried there as Americans." Pet. App. B6.

2. Petitioner argues that "the Court should grant review to clarify that government may not restrict access to a nonpublic forum on the basis of viewpoint." Pet. 21 (heading). But that issue is not presented in this case. The court of appeals specifically determined that the restrictions at issue are "viewpoint neutral." Pet. App. B12; see id. at B10-B12. That determination is correct and does not warrant further review.

Petitioner asserts that "[t]he decision below allows the VA to exclude the Confederate flag from the Cemetery 363 days a year because of the viewpoint(s) it expresses," in violation of the First Amendment. Pet. 22. The court of appeals, however, specifically found that, "[o]n this record, it is not possible to conclude that the VA discriminates against those who seek to display the Confederate flag or even that the VA is motivated by animosity toward that flag." Pet. App. B12. Indeed, as the court observed, under the VA's regulations "groups that wish to fly the Confederate flag actually enjoy an advantage over other groups," inasmuch as they "may fly the Confederate flag two days a year without seeking special permission." Id. at B11.

Moreover, as noted, the VA's practice of restricting the display of banners such as the Confederate flag is consistent with Congress's neutral objective of honoring all those buried at national cemeteries "as Americans." Pet. App. B6. The fact that the VA permits the display of the Confederate flag on Memorial Day and Confederate Memorial Day hardly suggests that the VA has discriminated against the Confederate flag. Rather, as the court of appeals noted, it merely reflects the VA's decision "to accommodate those, like [petitioner], who wish to honor the soldiers as Confederates," on holidays that naturally lend themselves to such an observance. Id. at B8. In addition, in deciding what displays are appropriate, the VA may consider that allowing the display of flags other than the U.S. flag may

undermine Congress's objective of creating a setting "dedicated to honoring, as Americans, the Nation's war dead." Id. at B9-B10.[4]

Nor, as petitioner suggests (at 25), did the court of appeals adopt or apply "an abuse-of-discretion standard of First Amendment review." The court of appeals merely recognized that the VA's reasonable, viewpoint-neutral restrictions on private speech in a non-public forum like Point Lookout must be upheld. As discussed above, and explained by the court of appeals, that analysis comes straight from Cornelius. Pet. App. B3. It in no way conflicts with any decision of this Court or any court of appeals.

Petitioner contends (at 25) the Fourth Circuit "ignored * * * key findings of fact that it should have reviewed for clear error." That is incorrect. The court of appeals specifically discussed the purported findings relied upon by petitioner, and explained that, even if assumed to be valid findings, they were beside the point for purposes of the forum analysis. Pet. App. B6. As the court explained, "the reasonableness of the VA's restrictions turns on whether the purpose of Point Lookout is to honor the Confederates as Confederates or as Americans." Ibid. The district court made "no factual finding" on that point and, in any event, the court of appeals properly concluded that the statute compels the conclusion that "that the purpose of Point Lookout is to honor the soldiers

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[4] Petitioner's reliance (at 23) upon case law rejecting the principle of a "heckler's veto" is misplaced. The notion of a heckler's veto does not come into play here, because, as the court of appeals properly concluded, the VA has restricted private flag displays at Point Lookout and other national cemeteries without respect to viewpoint. Pet. App. B12.

buried there as Americans." Ibid. None of the purported "special attributes and circumstances" of Point Lookout relied upon by petitioner (at 25) alters the unmistakable congressional purpose of the forum involved in this case, or renders the challenged restriction unreasonable in light of that purpose.

3. Petitioner argues that "the Court should grant review to clarify that speech restrictions in a nonpublic forum must comply with constitutional prohibitions against vagueness." Pet. 26. In particular, he asserts that "the Shuttlesworth [v. City of Birmingham, 394 U.S. 147, 150-151 (1969)] requirement of definite standards should apply in a nonpublic forum." Pet. 28. The court of appeals, however, did not pass on that question and, indeed, the court's opinion does not even mention Shuttlesworth. It is well-settled that this Court generally does not resolve questions that were not decided below, see, e.g., United States v. United Foods, Inc., 533 U.S. 405, 416-417 (2001); NCAA v. Smith, 525 U.S. 459, 470 (1999), and there is no reason for the Court to depart from that settled practice here.

Moreover, as petitioner acknowledges (Pet. 28), this issue was addressed in the separate facial challenge that he brought to the relevant VA regulations in the Federal Circuit. Griffin v. Secretary of Veterans Affairs, 288 F.3d 1309 (2002), petition for cert. pending, No. 01-1782 (filed May 30, 2002). Petitioner claims that the Federal Circuit's ruling on that question in the separate action conflicts with the holding of other circuits. As explained in the government's brief in opposition to the petition in No. 01-

1782, that argument lacks merit. In any event, the argument does not support further review in this case, where that question was not even addressed by the court of appeals in rejecting petitioner's as-applied challenge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2002